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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/544,218	06/12/2006	Pascal Crepel	03715.0149-00000	9486
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FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP 901 NEW YORK AVENUE, NW WASHINGTON, DC 20001-4413				
EXAMINER				
BADR, HAMID R				
ART UNIT		PAPER NUMBER		
1794				
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/544,218

Applicant(s)

CREPEL ET AL.

Examiner

HAMID R. BADR

Art Unit

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 13 October 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-12 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-12 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/CD)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Applicants' amendment filed 10/13/2009 is acknowledged.

Claims 1-12 are being considered on the merits.

Claim Rejections - 35 USC § 112

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claims 1-12 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.
3. Claim 1 is indefinite for "14% (m/m)". It is not clear what is meant by "m/m". It is not clear what the applicants regard as the invention.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 1-12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Amen et al. (WO 89/02702; hereinafter R1).
5. R1 discloses the incorporation of cream into fermented yogurt product which can have added flavorings. R1 discloses that pasteurized cream, flavoring agents and

coloring agents can be added to the fermented yogurt. R1 further teaches that for acceptable product stability, the fat content of the product should be in the range of 8-11% by weight based on the total weight of the finished product. (page 9, lines 19-33).

6. R1 also discloses a formulation wherein cream is added to a fermented yogurt. The finished products are made in vanilla and strawberry flavorings. R1 discloses the mixing of cream into the yogurt bulk. Flavorings are then mixed into the yogurt containing cream. (Page 11-12, Example 1)

7. While R1 does not expressly mention using homogenized cream, however, since the product disclosed by R1 is a shelf-stable aerosol dispensable yogurt, the stability disclosed and the homogeneity required by an aerosol dispensable product necessitates the incorporation of homogenized cream. It is also noted that in order to avoid creaming of the fat content when sitting on a shelf, the incorporated cream necessarily is a homogenized cream.

8. Since the stability of the product disclosed by R1 necessitates incorporating a homogenized cream, the free fat globules will intrinsically possess the particle diameter as disclosed. The fat globules associated with the yogurt (protein-fat network) will have the particle size of fat globules in a regular yogurt.

9. While R1 is silent regarding a chocolate flavored product or a vanilla flavored product containing chocolate chips, given that R1 discloses the incorporation of flavoring agents into the product, it is obvious to those of skill in the art that flavors such as chocolate flavor on its own or vanilla flavor and chocolate chips can be added to the formulations disclosed by R1.

10. Therefore, it would have been obvious to one of ordinary skill in the art, at the time the invention was made to modify the yogurt product of R1 by adding either chocolate flavor or vanilla flavor containing chocolate chips to the product. One would do so to make various flavors of a base mix. Absent any evidence to contrary and based on the teachings of the cited reference, there would be a reasonable expectation of success in making a yogurt product containing added cream in various flavors.

11. Claims 1-12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Van Dijk et al. (GB 1,476,309; hereinafter R2)

12. R2 discloses a process in which cream is admixed with an acidified milk product and whipped to produce a whipped topping. (page 1, col. 1, line 31 to col. 2, line 59).

13. While R2 does not expressly mention the incorporation of homogenized cream, in order for a whipped topping to be stable, the cream portion is expected to be homogenized.

14. R2 discloses a formulation where yogurt is mixed with cream to make a whipped topping. (Page 2, Example 2).

15. R2 teaches that additional sugar, flavors and other additives can be incorporated into the mixture. (page 2, col. 1, lines 15-18).

16. Given that cream and yogurt are mixed to make the final product, the particle diameter for the free fat globules and protein-fat globules as presently claimed will be intrinsic in the finished product.

17. Given that R2 discloses the addition of flavors of choice, it would be obvious to those of skill to incorporate flavors as presently claimed.

18. While the cream and yogurt proportions as disclosed by R2 are slightly different from cream and yogurt proportions as presently claimed, since varying the cream and yogurt proportions would result in different overruns (as disclosed by R2), different whipping properties, different flavors, and different caloric values, one would be motivated to changes those proportions for any of the mentioned reasons. Consequently, the cream and yogurt proportions as presently claimed can be manipulated by those of skill in the art.

19. Given that R2 teaches the mixing steps for various formulations, mixing in-tank and in-line as presently claimed would be obvious to those of skill in the art.

20. A yogurt product comprising cream and fermented yogurt as disclosed by R2 can be made with various flavorings. Therefore, it would have been obvious to one of ordinary skill in the art to modify the teachings of R2 by changing the cream and yogurt proportions in the formulations and incorporate various flavorings to make the yogurt of the instant invention. One would do so to take advantage of a variety of products regarding flavor, texture, whipping properties, and caloric value. Absent any evidence to contrary and based on the teachings of the cited reference, there would be a reasonable expectation of success in making a bimodal yogurt of different flavors as presently claimed.

Response to Arguments

Applicants' arguments have been carefully reviewed. These arguments are not deemed persuasive for the following reasons.

1. Applicants argue that R1 does not disclose, either expressly or inherently, free fat globules having a specific diameter and fat globules connected to protein-fat network.

a. As mentioned *supra*, the shelf table aerosol dispensable product of R1 necessitates the incorporation of homogenized cream. As such, the particle size of the fat globules provided by the cream will intrinsically be within the claimed range. The particle size of the fat globules in the protein-fat network will be those of a regular yogurt. Therefore, the product of R1 is necessarily a bimodal structure.

2. Applicants argue that the product disclosed by R2 does not have the fat globule particle diameter range as presently claimed.

As reasoned above under the rejection section, a whipped product, as disclosed by R2, is expected to be stable. The stability and organoleptic requirements necessitate the incorporation of homogenized cream. Therefore, the fat globule particle diameter as presently claimed for the free fat globules will be intrinsic in the fat globules of the homogenized cream. The yogurt portion of the formulation will provide the fat globules connected to the protein-fat network. Therefore, the product as disclosed by R2 will be a bimodal product.

Additional manipulations regarding the cream and yogurt proportions to change certain characteristics of the product would have been within the skill of the art. It should be realized once the incorporation of cream into yogurt is recognized by the art, manipulations and optimizations would be within the skill of the art.

Conclusion

21. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. US 4,163,802. discloses a process wherein a yogurt base is mixed with cream to make a base to which various flavoring can be added. WO 00/19831 discloses yogurt products of various flavors including vanilla and chocolate flavors. JP 11-276067 (machine translation) discloses yogurt products of low syneresis due to fat globules in a defined range.

22. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to HAMID R. BADR whose telephone number is (571)270-3455. The examiner can normally be reached on M-F, 8:00-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Hamid R Badr
Examiner
Art Unit 1794

/KEITH HENDRICKS/

Supervisory Patent Examiner, Art Unit 1794